(4)

No. 97-1008

In The

Supreme Court of the United States

October Term, 1998

CAROLYN C. CLEVELAND,

Petitioner,

v.

POLICY MANAGEMENT SYSTEMS CORP.; GENERAL INFORMATION SERVICES, a Division of Policy Management Systems Corporation; and CYBERTEK CORP.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

1. Whether the application for, or receipt of, disability insurance benefits under the Social Security Act, 42 U.S.C. § 423, creates a rebuttable presumption that the applicant or recipient is judicially estopped from asserting that she is a "qualified individual with a disability" under the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101, et seq.

2. If it does not create such a presumption, what weight, if any, should be given to the application for, or receipt of, disability insurance benefits when a person asserts she is a "qualified individual with a disability" under the ADA?

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BRIEF FOR PETITIONER

Petitioner, Carolyn C. Cleveland, respectfully requests that the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled proceeding on August 14, 1997, affirming the District Court below, be reversed and that this case be remanded to the District Court for trial on the merits.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit, reported at 120 F.3d 513 (5th Cir. 1997), affirmed the decision of the United States District Court for the Northern District of Texas, which granted summary judgment in favor of the Respondents. The Fifth Circuit's August 14, 1997 Opinion is printed at Appendix A to the Petition for a Writ of Certiorari. The District Court's September 6, 1996 Judgment is printed at Appendix B to the Petition for a Writ of Certiorari. The Fifth Circuit's September 15, 1997 Order denying Petitioner's Petition for Rehearing is printed at Appendix C to the Petition for a Writ of Certiorari.

JURISDICTION

The judgment of the Fifth Circuit was entered on August 14, 1997. Petitioner timely filed a petition for rehearing which was denied on September 15, 1997. The Petition for a Writ of Certiorari was timely filed on

December 15, 1997. This Court's certiorari jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1) (1993).

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations applicable to this case are:

Americans With Disabilities Act of 1990:

General Rule

No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and or other terms, conditions, and privileges of employment. 42 U.S.C. § 12112(a).

Disability

The term "disability" means, with respect to an individual –

(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;

(B) a record of such an impairment; or

(C) being regarded as having an impairment. 42 U.S.C. § 12102(2).

Qualified Individual with a Disability

The term "qualified persons with a disability" means an individual with a disability who, with

or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. 42 U.S.C. § 12111(8).

Social Security Act:

Disability

The term "disability" means – inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months. 42 U.S.C. § 423(d)(1)(A).

An individual shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy, regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work. For purposes of the preceding sentence (with respect to any individual), 'work which exists in the national economy' means work which exists in significant numbers either in the region where such individual lives or in several regions of the country. 42 U.S.C. § 423(d)(2)(A).

Evaluation of a Disability in General (Social Security Administration Regulations)

If you are working. If you are working and the work you are doing is substantial gainful activity, we will find that you are not disabled regardless of your medical condition or your age, education and work experience. 20 C.F.R. § 404.1520(b).

You must have a severe impairment. If you do not have any impairment or combination of impairments which significantly limits your physical or mental ability to do basic work activities, we will find that you do not have a severe impairment and are therefore, not disabled. We will not consider your age, education, and work experience. However, it is possible for you to have a period of disability for a time in the past even though you do not now have a severe impairment. 20 C.F.R. § 404.1520(c).

When your impairment(s) meets or equals a listed impairment in Appendix 1. If you have an impairment(s) which meets the duration requirement and is listed in Appendix 1 or is equal to a listed impairment(s), we will find you disabled without considering your age, education and work experience. 20 C.F.R. § 404.1520(d).

Your impairment(s) must prevent you from doing past relevant work. If we cannot make a decision based on your current work activity or on medical facts alone, and you have a severe impairment(s), we then review your residual functional capacity and the physical and mental demands of the work you have done in the past. If you can still do this kind of work, we will find that you are not disabled. 20 C.F.R. § 404.1520(e).

Your impairment(s) must prevent you from doing any other work. (1) If you cannot do any work you have done in the past because you have a severe impairment(s), we will consider your residual functional capacity and your age, education and past work experience to see if you can do other work. If you cannot, we will find you disabled. (2) If you have only a marginal education, and long work experience (i.e., 35 years or more) where you only did arduous unskilled physical labor, and you can no longer do this kind of work, we use a different rule. 20 C.F.R. § 404.1520(f).

STATEMENT OF THE CASE

Cleveland's Disability

On January 7, 1994, during the course and scope of her employment with Policy Management Systems Corporation ("PMSC"), Carolyn Cleveland suffered a stroke. (J. App. 94).[1]

Steven Herzog, M.D. provided medical treatment to Cleveland in connection with her stroke. (J. App. 94, 99). As a result of the stroke, Cleveland suffered a condition known as aphasia. (J. App. 100). Aphasia is a disorder involving the cognitive input and output of language. (J. App. 100). Aphasia impairs memory, reading ability, calculation ability and the understanding and processing of all human language function. (J. App. 100).

Consistent with stroke-induced aphasia, Cleveland's memory was impaired, as well as her ability to speak and

[1] "J. App." refers to the Joint Appendix in this case.

to concentrate. (J. App. 94). In fact, for a period of time after the stroke, Cleveland could not speak at all. (J. App. 94). Additionally, Cleveland was unable to read or dial a phone, and had trouble understanding most of what was said to her. (J. App. 94).

The Initial Application for Social Security Disability Benefits

After observing Cleveland's difficulty with communication, comprehension and memory, Cleveland's daughter, Sheri Short, became concerned about her mother's condition. (J. App. 105). As a result, in January 1994, Short obtained an application for social security disability benefits.[2] (J. App. 105). Short completed the application and her mother signed it on January 21, 1994. (J. App. 105). Short then submitted the application to the Social Security Administration ("SSA") for her mother. (J. App. 105). Due to Cleveland's debilitated condition in January 1994, Cleveland neither recalls her daughter filing this application nor signing the form. (J. App. 95).

This initial application was followed by a "Supplemental Questionnaire" dated March 16, 1994, signed by Cleveland. (J. App. 31). In this document, Cleveland described her symptoms and limitations as they existed at the time, i.e., only two months after the stroke. (J. App. 31-36). Cleveland had not been released to return to work

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[2] Short had previously worked for the Tarrant County Adult Probation Department for approximately 14 years, and had observed that the processing of government paperwork was often a slow process. Therefore, Short requested the social security application quickly in the event her mother would need benefits. (J. App. 105).

at that time, and as indicated on the form, had not returned to work. (J. App. 36, 95, 100).

Cleveland's Efforts to Return to Work Despite Her Disability

After suffering the stroke, Cleveland diligently pursued recovery. (J. App. 95). In fact, by April 1994, after undergoing speech rehabilitation, Cleveland was able to speak fairly well. (J. App. 95). Dr. Herzog also confirmed that Cleveland had made significant progress in her recovery between January and April 1994. (J. App. 100).

In light of Cleveland's progress, Dr. Herzog released Cleveland to return to work in April 1994. (J. App. 100). At the time Cleveland was released to return to work, Dr. Herzog felt Cleveland's prognosis was positive for continued improvement and that she would eventually reach a near 100% recovery. (J. App. 100).

Cleveland's Notice To The Social Security Administration That Disability Benefits Were No Longer Needed

Cleveland returned to work for PMSC in April 1994 on a part-time basis. (J. App. 95). Shortly after returning to work, Cleveland received some paperwork from the SSA. (J. App. 95). Upon receiving this paperwork, Cleveland contacted the SSA and informed them that she had returned to work and that she no longer needed social security disability benefits. (J. App. 38, 95).

Cleveland's Return To Work

Cleveland worked part-time for about two weeks and then began working full time. (J. App. 95). Cleveland was

fearful about returning to work, but her supervisors, Anthony Clark and Debra Levine, claimed they would assist her, or, if necessary, would provide her another job. (J. App. 95-96). This did not occur. (J. App. 96-98).

All Requests For Reasonable Accommodations Were Denied

When Cleveland returned to work, she was not fully recovered from the stroke,[3] and she experienced some difficulty with the increased workload she was assigned. (J. App. 96). However, as the Fifth Circuit acknowledged in their August 14, 1997 Opinion, the Respondents denied each of Cleveland's requests for workplace accommodations, to wit: computer training; permission to take work home in the evenings; a transfer of position; and permission for the Texas Rehabilitation Commission to provide a counselor – free of charge – to assist Cleveland. (Pet. App. 3a;[4] J. App. 43-44, 96-97).

The Inexcusable Ridicule

In addition to the steadfast refusal to make any reasonable accommodations for Cleveland's disability, Cleveland's supervisor, Debra Levine, and other co-workers made cruel and mocking remarks in reference to Cleveland's disabled condition. (J. App. 43-44, 96). For instance, in Cleveland's presence, Levine and her co-workers

[3] Dr. Herzog noted that it sometimes takes 6-12 months to fully recover from a stroke. (J.App. 44).

[4] "Pet. App." refers to the Appendix to the Petition for a Writ of Certiorari in this case.

laughed at Cleveland and belittled her by mimicking her stroke-induced speech impediment. (J. App. 96).

The Written Warning And Cleveland's Continued Determination To Succeed

After enduring her co-worker's taunts and her supervisor's refusal to accommodate her disability, on June 3, 1994, less than two months after returning to work from her stroke, Cleveland received her first written warning. (J. App. 97, 40). This warning, issued by Levine, criticized Cleveland's job performance and informed Cleveland that if there were not "drastic changes in the quality of work" that Cleveland would be "subject to be separated from the company." (J. App. 40). In response to this written warning, Cleveland did not surrender, but rather doubled her efforts to produce quality work, despite Levine's continued refusal to grant Cleveland's requests for accommodations.[5] (J. App. 97). In fact, a day or two

[5] In a June 21, 1994 memo, Levine (at Cleveland's request for an extension of time to train) agreed to extend Cleveland's training period to August 1, 1994, and to evaluate her job performance at that time to determine whether to terminate Cleveland or change her status to a fee inspector. Just half way through the promised extension period, however, Levine retracted this extension and terminated Cleveland. (J. App. 42, 97). (Cleveland had been told in Levine's June 3 written warning that Cleveland had been with the company for 9 months as a "Trainee" and that most employees were trainees for three to six months. Levine then stated that she had taken into account that Cleveland "had been out" for three months and informed Cleveland that on June 30, 1994 her employee status would be subject to change to that of a fee inspector or that Cleveland would be "separated from the company" if her performance did not drastically improve.) (J. App. 40).

before Cleveland's termination, Cleveland felt encouraged because, despite her supervisor's repeated refusal to provide training, Cleveland began to receive additional training from some of her co-workers. (J. App. 97).

In addition to finally receiving some training, Cleveland was experiencing fewer stroke-related problems during the time prior to the termination. (J. App. 97, 100). Specifically, Cleveland could more easily communicate, her spelling had improved and the need to recheck her work decreased.[6] (J. App. 97, 100). Cleveland felt positive about her job performance. (J. App. 97). Moreover, prior to her termination, Dr. Herzog had anticipated that Cleveland would experience a near 100% recovery. (J. App. 100-01).

The "Because You Will Never Be Able To Do Anything" Termination

Regardless, on July 14, 1994, Peter Moore, the Regional Vice President, and Debra Levine informed Cleveland that she was terminated allegedly because of poor job performance. (J. App. 97). Cleveland begged Moore to let her keep her job or move to another job. (J. App. 97). At this, Moore explained to Cleveland that his father had previously suffered a stroke and had not been able to do anything since. (J. App. 98). Moore then declared that, like his father, Cleveland would not be able to do anything either. (J. App. 98). During the initial

[6] Dr. Herzog observed that Cleveland was experiencing fewer problems with aphasia, but still needed additional time to recover. (J. App. 100).

termination meeting, Moore did agree to review Cleveland's work; however, the next day, Moore confirmed the termination. (J. App. 98).

Cleveland's Post-Termination Relapse And Resulting Requests For Reconsideration For Social Security Disability Benefits (with relevant excerpts from the benefit applications)

As a result of the humiliating manner in which she was treated and terminated, Cleveland was devastated, and she began to deteriorate both physically and emotionally. (J. App. 98, 101, 105-06). Specifically, Cleveland became depressed and her aphasia worsened after the July 1994 termination. (J. App. 43-44).

For this reason, on September 14, 1994, Cleveland renewed her prior application for social security disability benefits by filing a "Request for Reconsideration".[7] (J. App. 46, 98). In this request, Cleveland stated:

> I disagree with the determination made on my claim for disability-worker or child benefits because I was denied because I had returned to work and was making over $500. However, on July 15, 1994 I was terminated due to my condition and I have not been able to work since. I continue to be disabled.

[7] The Social Security Administration confirmed that Cleveland would not be entitled to receive disability benefits in a letter dated July 11, 1994. (J. App. 38-39). The SSA acknowledged that it had received notice that Cleveland had returned to work full time and was earning more than $500 per month. (J. App. 39). As indicated in a 4/23/94 note in Cleveland's SSA file, Cleveland had previously informed the SSA that she had returned to work. (J. App. 38).

(J. App. 46). In connection with this request, Cleveland also filed a "Work Activity Report" dated September 20, 1994 wherein she explained:

> I had my stroke 1/7/94 and was out of work for several months. I attempted to return to work mid April. I worked for three months before they terminated me because I could no longer do the job because of my condition.

(J. App. 47). Notably, that Cleveland could not do the job because of her condition was PMSC's stated reason for the termination. (J. App. 97-98).

In a "Supplemental Questionnaire" dated September 29, 1994 (signed by Cleveland and filled out by her daughter, Sheri Short), Cleveland described her then current symptoms and limitations. (J. App. 51-56). In response to an inquiry about activities which Cleveland could no longer do, she responded: "Find work related to my experience." (J. App. 52). Also, in response to a question about whether she had difficulty completing tasks, Cleveland responded: "Yes, in a timely manner due to length of time it takes to complete the task." (J. App. 56). (Notably, this statement is consistent with Cleveland's prior request to take work home with her to allow additional time to complete assignments – an accommodation which was denied by PMSC). (J. App. 96). In response to the SSA's inquiry into Cleveland's daily activities, Cleveland stated: "Routine tasks, make and keep appointments with government agencies, doctors; assist other stroke victims and the stroke recovery group." (J. App. 52).

In a notice dated November 30, 1994, the SSA informed Cleveland that her claim for disability benefits

was denied because she was not disabled under SSA regulations. (J. App. 62).

In approximately December 1994, Cleveland began seeing a psychologist, Bob L. Gant, Ph.D., for her depression and worsening condition. (J. App. 98). Dr. Gant determined that the loss of Cleveland's job and income were "emotionally devastating and have compounded her injury by affecting her self-confidence and self-esteem." (J. App. 70).

On January 9, 1995, Cleveland filed another "Request for Reconsideration" with the SSA. (J. App. 73). In this request, Cleveland repeated, as her reason for disagreeing with the prior determination, the reason given by PMSC for her termination: "I am unable to work due to my disability." (J. App. 73, 97-98). This request was denied in an April 17, 1995 notice from the SSA stating that Cleveland's condition was not severe enough to keep her from working. (J. App. 77-78).

Cleveland then asserted her right to appeal this decision and requested a hearing by an Administrative Law Judge. (J. App. 79). In her May 9, 1995 "Request for Hearing By an Administrative Law Judge", Cleveland again repeated, as her reason for disagreeing with prior decision, the reason given by PMSC for her termination: "I am unable to work due to my disability." (J. App. 79).

In a September 29, 1995 decision by the Administrative Law Judge ("ALJ"), Cleveland was granted social security disability benefits effective retroactively to January 7, 1994, the date of her stroke. (J. App. 83-92). The ALJ found that Cleveland was disabled at all times subsequent to the date of the initial January 1994 application and that she was entitled to "disability insurance benefits

pursuant to the Social Security Act and the regulations promulgated thereto." (J. App. 84). Consistent with the Social Security Act's guidelines for a determination of "disability", the ALJ's analysis in reaching his determination that Cleveland was "disabled" *did not include* an inquiry into, or consideration of, the effect reasonable workplace accommodations would have on Cleveland's ability to work. (J. App. 83-92). In fact, the "Decisional Findings of Fact" form completed by the ALJ, and used as a tool for making his decision, inquires about Cleveland's abilities in "usual work situations" or "routine work settings", and does not refer to accommodated work situations. (J. App. 85-87).

Procedural History Of Cleveland's ADA Case

Approximately one week before receiving notice of the decision from the SSA, Cleveland filed suit against PMSC for disability discrimination, failing to accommodate her disability and terminating her in violation of the Americans With Disabilities Act. (J. App. 5-8, 83-92). PMSC moved for summary judgment on this claim for the sole reason that Cleveland was judicially estopped from claiming to be a "qualified individual with a disability" under the ADA by reason of her application for and receipt of social security disability benefits. (Record 46-47).

Included in the evidence presented in opposition to the summary judgment motion was an affidavit from Steven Herzog, M.D., which stated that Cleveland suffered from aphasia and depression. (J. App. 100-01). Dr. Herzog confirmed that Cleveland's depression resulted from her termination and that her depression over the

termination caused her aphasia to worsen. (J. App. 99-103). Dr. Herzog further stated, in his opinion, that had Cleveland "been given training time and assistance on the job, instead of being terminated, she would have continued to recover from the stroke." (J. App. 101). Dr. Herzog also noted that "[w]ith time, understanding and therapy, Cleveland has slowly begun to recover from the post-termination relapse of her aphasia and depression." (J. App. 101).

Nevertheless, finding that Cleveland was judicially estopped from claiming to be a "qualified individual with a disability" because she previously declared herself "disabled" to the SSA, the district court granted summary judgment on Cleveland's ADA claim. (Pet. App. 14a).

The Fifth Circuit's Opinion

On appeal, in an Opinion dated August 14, 1997, the Fifth Circuit held:

> [T]he application for or the receipt of social security disability benefits creates a *rebuttable* presumption that the claimant or recipient of such benefits is judicially estopped from asserting that he is 'a qualified individual with a disability.'

(emphasis in original), *Cleveland v. Policy Management Sys. Corp.*, 120 F.3d 513, 518 (5th Cir. 1997); (Pet. App. 11a). Although ostensibly rejecting a per se estoppel application to ADA cases wherein the employee had applied for or received social security disability benefits, the Fifth Circuit determined that it would only be "under some limited and highly unusual set of circumstances" that

"the two claims would not necessarily be mutually exclusive. . . . " *Id.* at 517; (Pet. App. 8a-9a). After announcing its novel approach to this issue, the Fifth Circuit then affirmed the summary judgment and held that Cleveland "failed to raise a genuine issue of material fact which, if proved, would rebut the presumption that her sworn declarations of disability submitted to the Social Security Administration (SSA) judicially estop her from asserting that under the ADA she is a 'qualified individual with a disability.' " *Id.* at 514; (Pet. App. 12a).

In disposing of Cleveland's case, the Fifth Circuit never addressed the "reasonable accommodation" difference between an SSA claim and an ADA claim and declared that Cleveland "continuously and unequivocally" represented to the SSA that she was "disabled and completely unable to work"; and therefore, she could not "now be heard to complain that she could perform the essential functions of her job during the time between her return to work and her termination." *Id.* at 518; (Pet. App. 12a). The Fifth Circuit, without addressing the SSA's failure to consider workplace accomodations, stated: "[t]o permit Cleveland to make such an argument in the face of her prior, and – until now – uncontested sworn representations to the SSA would be tantamount to condoning her advancement of entirely inconsistent positions, a factual impossibility and a legal contradiction." *Id.* at 518; (Pet. App. 12a).

In addition to placing an inappropriately heightened legal burden on Cleveland (i.e., to overcome a presumption of judicial estoppel), the Fifth Circuit's opinion failed to acknowledge the summary judgment evidence that Cleveland could have performed the essential functions of her job *with reasonable accommodations*. *Id.* at 518-19;

(Pet. App. 12a; J. App. 7, 95-97). Likewise, the opinion incorrectly concluded that Cleveland's statements to the SSA were inconsistent with her position in her ADA case. *Id.* at 518; (Pet. App. 12a).

Cleveland's timely filed Petition for Rehearing was denied on September 15, 1997. (Pet. App. 16a).

Writ of Certiorari

Cleveland then sought certiorari. This Court granted certiorari on two issues:

> (1) Whether the application for, or receipt of, disability insurance benefits under the Social Security Act, 42 U.S.C. § 423, creates a rebuttable presumption that the applicant or recipient is judicially estopped from asserting that she is a "qualified individual with a disability" under the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 et seq.; and
>
> (2) If it does not create such a presumption, what weight, if any, should be given to the application for, or receipt of, disability insurance benefits when a person asserts she is a "qualified individual with a disability" under the ADA?

See Cleveland v. Policy Management Sys. Corp., 119 S.Ct. 39 (1998).

SUMMARY OF THE ARGUMENT

With a multitude of Americans receiving social security disability benefits today, and recognizing the history of discrimination against disabled individuals, requiring

social security disability applicants/recipients to overcome the heightened legal burden of a presumption of judicial estoppel in a disability discrimination claim is tantamount to repealing the ADA for millions of disabled individuals who clearly should have the benefit of its protection.

To judicially estop an individual from claiming to be a "qualified individual with a disability" based on representations made in connection with an application for social security disability benefits is inappropriate because there is simply nothing inconsistent in the position one takes in an ADA claim and in a claim for social security disability benefits. As such, a presumption of judicial estoppel has no place in determining the viability of a disability discrimination claim. Statements made in connection with an application for disability benefits should receive no greater weight than other statements or evidence; i.e., the statements should be considered in the context in which they were made and assigned the weight deemed appropriate by the factfinder.

When analyzing the facts in *Cleveland* and determining that her statements were "entirely inconsistent", the Fifth Circuit improperly failed to consider the context in which the statements were made and ignored the fact that assertions made in a social security disability context do not address the accommodation issue. Because the question of reasonable accommodation was not raised in the SSA proceeding, Cleveland's statements that she was "disabled" or "unable to work" or "unable to do [her] job" were not inconsistent with her claim in her ADA case that she would have been able to do her job *had she been provided reasonable accommodation*.

Moreover, similar statements to the SSA of an inability to work or total disability and the like, which are no doubt made by almost all other social security disability applicants, are not inconsistent with an ADA claim, and likewise should not give rise to judicial estoppel. Considering the context in which such statements of "disability" are made, and the lack of consideration of the accommodation issue, there is simply no inconsistency and no basis for creating a presumption of judicial estoppel.

ARGUMENT

I. The application for, or receipt of, disability insurance benefits under the Social Security Act, 42 U.S.C. § 423, *does not* create a rebuttable presumption that the applicant or recipient is judicially estopped from asserting that she is a "qualified individual with a disability" under the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 et seq.

II. The weight to be given statements made in connection with an application for disability benefits should be no different than the weight given to any other evidence, i.e., the weight the factfinder determines is appropriate.

At the time the Americans with Disabilities Act ("ADA") was enacted, Congress noted that there were some 43 million Americans with one or more physical or mental disabilities. *See* 42 U.S.C. § 12101(a)(1). Presently, there are approximately 7.3 million disabled individuals

who receive financial support via the social security disability benefits programs.[8] *See* House Comm. On Ways and Means, 1996 Green Book: *Background Material and Data on Programs Within the Jurisdiction of the Committee on Ways and Means* 16, 260 (Comm. Print 1996).

The History of Discrimination Against the Disabled

When the Americans with Disabilities Act of 1990 was enacted, Congress recognized:

> Individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in and contribute to society.

42 U.S.C. § 12101(a). Congress confirmed that "historically, society has tended to isolate and segregate individuals with disabilities and that despite some

[8] This includes the total number of recipients receiving benefits under the Social Security Disability Insurance ("SSDI") program provided for in Title II of the Social Security Act and/or Supplemental Security Income ("SSI") program provided in Title XVI of the Social Security Act. Both the SSDI and the SSI programs provide financial support to the disabled. SSDI provides benefits to disabled workers who are considered entitled to insurance coverage by reason of payroll tax payments. *See* 42 U.S.C. § 423. SSI payments are provided to the disabled poor. *See* 42 U.S.C. § 1381-83.

improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem". *Id.*

Congress further concluded that discrimination based on disability persists in critical areas such as employment, and recognized that unlike individuals who have experienced discrimination on the basis of race, color, sex, national origin, religion or age, disabled individuals have often had no legal recourse to redress such discrimination. *Id.* According to Congress, "[t]he Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals." *Id.* Congress noted:

> The continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous, and costs the United States billions of dollars in unnecessary expenses resulting from *dependency* and nonproductivity.

(Emphasis added). *Id.*

The Purpose of the ADA and the Social Security Disability Insurance Program

The purpose of the ADA is:

> (1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;

(2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities;

(3) to ensure that the Federal Government plays a central role in enforcing the standards established in this chapter on behalf of individuals with disabilities; and

(4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.

42 U.S.C. § 12101(b).

The purpose of the Social Security Act in providing Social Security Disability Insurance ("SSDI") to disabled individuals is to provide financial support to those individuals who are unable to engage in substantial gainful activity due to medically determinable impairments – *without regard* to whether a specific job vacancy exists or *whether he would be hired if he applied for work.* (Emphasis added), 42 U.S.C. § 423. In other words, the SSA provides benefits to applicants meeting the definition of "disabled" without regard to whether a workplace accommodation would enable the applicant to perform a specific job. *Id.*; 20 C.F.R. § 404.1520(b-f).

A Presumption of Judicial Estoppel Confounds the Purpose of the ADA and SSA

In *Cleveland v. Policy Management Sys. Corp.*, the Fifth Circuit held:

> [T]he application for or the receipt of social security disability benefits creates a *rebuttable* presumption that the claimant or recipient of such benefits is judicially estopped from asserting that he is 'a qualified individual with a disability.'

(emphasis in original) *Cleveland v. Policy Management Sys. Corp.*, 120 F.3d 513, 518 (5th Cir. 1997) (Pet. App. 11a). Although ostensibly rejecting a per se estoppel rule in ADA cases where the employee has applied for or received social security disability benefits, the Fifth Circuit applied a presumption of judicial estoppel, reasoning that it would only be "under some limited and highly unusual set of circumstances" that "the two claims would not necessarily be mutually exclusive. . . . " *Id.* at 517 (Pet. App. 8a-9a).

Imposing such a presumption of judicial estoppel erroneously assumes that individuals who apply for SSA benefits and who also pursue their rights under the ADA are making inconsistent claims, and thereby, compromising the integrity of the judicial system.[9] In actuality, however, there is no inconsistency. *See* 20 C.F.R. § 404.1520(b-f); 42 U.S.C. § 12111(8). Rather than maintaining the integrity of the courts, the Fifth Circuit's judicial estoppel presumption instead precludes legitimate ADA claims asserted by disabled individuals who were doing nothing more than exercising their rights under two Federal Acts designed specifically to protect the disabled. In essence, the Fifth Circuit's opinion places

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[9] Typically, a presumption in the law arises when proof of a certain fact renders the existence of another fact sufficiently probable such that "it is sensible and time saving to assume the truth of [the other fact] until the adversary disproves it." *See* 2 *McCormick on Evidence* Sec. 343, at 454-55 (John W. Strong, 4th ed. 1992).

a uniquely onerous burden on SSDI recipients and reaffirms the position of political powerlessness of the disabled in our society.

Further, in applying this presumption, disabled individuals will essentially be forced to chose between an ADA claim and SSA benefits. *See Swanks v. Washington Metropolitan Area Transit Authority*, 116 F.3d 582, 586 (D.C. Cir. 1997). Thus, such a presumption would confound the pro-employment purpose of the ADA and further increase the number of disabled individuals resorting to reliance on SSA disability benefits.[10] *See also, Id.* Surely, the ADA was not intended to relegate disabled persons to only one scheme of governmental assistance.

Moreover, in *McKennon v. Nashville Banner Publishing Co.*, this Court noted that the ADA, the Age Discrimination in Employment Act and Title VII of the Civil Rights Act of 1964 constituted part of a wide statutory scheme designed to protect employees in the workplace. *See McKennon v. Nashville Banner Publishing Co.*, 513 U.S. 352, 356, 115 S.Ct. 879, 884, 130 L.Ed.2d 852 (1995). This Court found that a litigant who pursues a claim under the anti-discrimination statutes, "not only redresses his own injury, but also vindicates the important congressional policy against discriminatory employment practices." *McKennon*, 115 S.Ct. at 884, *citing, Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 45, 94 S.Ct. 1011, 1018, 39 L.Ed.2d 147 (1974) and *International Brotherhood of Teamsters v.*

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[10] Combined, the SSI and SSDI programs cost approximately 60 billion dollars a year, with the SSDI program accounting for approximately 40.9 billion dollars each year. *See* House Comm. On Ways and Means, 1996 Green Book: *Background Material and Data on Programs Within the Jurisdiction of the Committee on Ways and Means*, 17, 291 (Comm. Print 1996).

United States, 431 U.S. 324, 364, 97 S.Ct. 1843, 1869, 52 L.Ed.2d 396 (1977).

Clearly, a presumption that an SSDI applicant/recipient is judicially estopped from claiming to be a "qualified individual with a disability" is inappropriate because it would override the statutory schemes which were specifically designed to prevent discrimination, regardless of the egregiousness of the discriminatory conduct.

The Doctrine of Judicial Estoppel Is Inapplicable

Whether there is a "presumption" or not, the doctrine of judicial estoppel is inappropriate in an ADA case.

Judicial estoppel is an equitable doctrine which has been given differing definitions by the various Circuit Courts. For instance, the Fifth Circuit has held that judicial estoppel applies to prevent a party from asserting a position in a legal proceeding that is contrary to a position taken in the same or some earlier proceeding. *See Cleveland*, 120 F.3d at 517, *citing, Ergo Science, Inc. v. Martin*, 73 F.3d 595, 598 (5th Cir. 1996). According to the *Cleveland* court, the clear purpose of the doctrine is "to protect the integrity of the judicial system." *Id.*

> The Eleventh Circuit has held:
>
> [J]udicial estoppel 'is applied to the calculated assertion of divergent sworn positions. The doctrine is designed to prevent parties from making a mockery of justice by inconsistent pleadings.'

See Talavera v. School Bd. of Palm Beach County, 129 F.3d 1214, 1217 (11th Cir. 1997), *quoting, McKinnon v. Blue Cross & Blue Shield of Ala.*, 935 F.2d 1187, 1192 (11th Cir. 1991) (*quoting, American Nat'l Bank v. F.D.I.C.*, 710 F.2d 1528,

1536 (11th Cir. 1983)). The Seventh Circuit has applied judicial estoppel where (1) a latter asserted position was clearly inconsistent with an earlier position; (2) the facts at issue were the same in each case; and (3) the party to be estopped must have convinced the first court to adopt its position. *See Levinson v. United States*, 969 F.2d 260 (7th Cir. 1992). The Tenth Circuit finds: "Judicial estoppel bars a party from adopting inconsistent positions in the same or related litigation." *See Rascon v. U.S. West Communications, Inc.*, 143 F.3d 1324, 1330 (10th Cir. 1998). The Third Circuit broadly directs that judicial estoppel is applied at the court's discretion, on a case by case basis, to preserve the integrity of the judicial system by preventing parties from "playing fast and loose" with the judicial system in taking inconsistent positions. *See McNemar v. Disney Store, Inc.*, 91 F.3d 610, 617 (3rd Cir. 1996), *cert. denied*, 117 S.Ct. 958 (1997).

Although the definitions of estoppel vary[11], common to most definitions is the requirement that the individual must have asserted a position in a prior proceeding that is "inconsistent" with the individual's position in the current proceeding. It is this element of "inconsistency" that, at first glance, appears obvious when comparing an individual's declaration to the SSA that they are "disabled" and "unable to work" with that same individual's claim in an ADA case that they are "disabled" and "able to work". This apparent inconsistency vanishes; however,

[11] It appears that this Court has not adopted the doctrine of judicial estoppel in the context of employment discrimination/civil rights cases, nor in other cases outside the context of patent law.

upon closer review of the context in which such statements are made, the distinct definitions of "disability" under each Act, and the differing importance each Act places upon the impact of workplace accommodations and the ability to work.

There is No Inconsistency

It is clear that with the distinctions between the two Acts, it is entirely consonant to be "disabled" under the SSA and also be a "qualified individual with a disability" under the ADA.[12] After all, to invoke protection under each Act, one must first prove to be "disabled". *See* 42 U.S.C. §§ 12112(a), 12111(8); 42 U.S.C. § 423(d); 29 C.F.R. § 404.1520(b-f). Only then, *and only under the ADA*, must the individual address whether she could work with reasonable accommodations, i.e., whether she is a "qualified individual with a disability" under the ADA. *Id.*

Specifically, to prevail in an ADA case, the plaintiff must first establish a *prima facie* case by demonstrating that (1) she has a disability; (2) she is otherwise qualified for the job in question; and (3) an adverse employment action was taken against her because of her disability. *See*

[12] *See also*, Matthew Diller, *Dissonant Disability Policies: The Tensions Between the Americans With Disabilities Act and Federal Disability Benefit Programs*, 76 Tex. L. Rev. 1003, 1006-07 (1998) ("There is no inherent contradiction between the idea that some individuals should receive income support as a response to their disabilities and the notion that our society should remove obstacles faced by persons with disabilities in the job market and the workplace. Indeed, income support and civil rights protection can be seen as two essential parts of a comprehensive disability policy.")

Hamilton v. Southwestern Bell Telephone Co., 136 F.3d 1047, 1050 (5th Cir. 1998); *Barber v. Nabors Drilling U.S.A., Inc.*, 130 F.3d 702, 706 (5th Cir. 1997). In *Hamilton*, the Fifth Circuit expressly recognized that the threshold issue in an ADA case is a showing that the plaintiff is "disabled."[13]

Once it is established that a plaintiff has a "disability" under the ADA, the question then becomes whether the plaintiff is an "otherwise qualified individual with a disability", i.e., can the individual perform the essential functions of a job either with or without reasonable accommodation. *See Barber*, 130 F.3d at 706; 42 U.S.C. § 12111(8). The *Barber* court found that a determination of whether a plaintiff is "otherwise qualified" depends upon the resolution of two corollary questions: (1) what are the essential functions of the job in question; and (2) are any proposed accommodations reasonable. *Id.* at 706. As noted in *Barber*, the second question would become irrelevant only if the jury determined that the plaintiff could have performed the essential functions of her job *without* reasonable accommodation. *Id.* As such, in an ADA claim, the pivotal issues are whether the plaintiff is "disabled" under the ADA, and if so, can she, despite the disability, perform the essential functions of her job *either with or without reasonable accommodation*.

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[13] The *Hamilton* Court pointed out that the ADA confers the following "special meaning" on the term "disability":(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having an impairment. *Hamilton* at 1050; *see also, Bragdon v. Abbott*, 118 S.Ct. 2196, 2202 (1998); 42 U.S.C. § 12102(2).

Conversely, the SSA's determination of eligibility for SSDI benefits never makes an inquiry into reasonable workplace accommodation or the essential functions of a specific job. Specifically, in the context of an SSDI application, an applicant must demonstrate that they are "disabled" as defined by the SSA, i.e., that they are unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months. 42 U.S.C. § 423(d)(1)(A). In making this determination, the SSA utilizes a five-step evaluation process:

> (1) The SSA determines whether the claimant is currently engaged in "substantial gainful activity". If so, the application is denied. If not, the SSA proceeds to step two.
>
> (2) The SSA determines whether the claimant has an impairment which is "severe" enough to significantly limit his ability to perform basic work activities. If not, the application is denied. If so, the SSA proceeds to step three.
>
> (3) The SSA determines whether the impairment is equivalent to an impairment which is listed as presumptively disabling in the regulations.[14] If the claimant's condition matches one of the listed impairments, the SSA awards disability benefits without making further inquiry. If the condition is not "listed", the SSA proceeds to step four.

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[14] *See* 20 CFR Pt. 404 Subpt. P, App. 1.

(4) The SSA determines whether the claimant is able to perform his "past, relevant work." If so, benefits are denied. If not, the SSA proceeds to step five.

(5) The SSA determines whether the claimant can perform "other work", i.e., jobs "that exist in significant number in the national economy." In making this determination, the SSA considers the claimant's age, education, past work experience and residual functional capacity. If so, the SSA denies the application. If not the SSA awards disability benefits.

See 20 C.F.R. § 404.1520(b-f); *Talavera v. School Bd. of Palm Beach County*, 129 F.3d at 1218-19.

In clear contrast to the ADA, nowhere in their analysis does the SSA consider the impact of possible workplace accommodations on the individual's ability to work. *See Talavera*, 129 F.3d at 1219, *citing*, *Swanks v. Washington Metropolitan Area Transit Authority*, 116 F.3d at 585. For instance, at step three of the SSA evaluation, an applicant, who is not engaged in substantial gainful activity and has a "listed" disability, automatically receives benefits without inquiry into the applicant's actual ability to work. *Talavera*, at 1219; *Swanks*, at 585. Also, regardless of which evaluation step is considered, "[t]he fact that an individual may be able to return to a past relevant job, provided that the employer makes accommodations, [is] *not relevant*" in determining eligibility for social security disability benefits. (Emphasis added). *See* Daniel L. Skoler, Assoc. Comm'r SSA, Disabilities Act Info. Mem. (June 2, 1993), *reprinted in 2 Social Security Practice Guide*, App. Sec. 15C[9] (*SSA Guidance*), at App. 15-401 (MB 1997); *see also*, *Swanks*, 116 F.3d at 585.

Although the same threshold terminology is used in the context of both an ADA case and an SSA claim (e.g., "I am disabled"), coverage under each Act turns on a distinct and specific set of definitions and analysis. Thus, beyond the threshold question of "disability", the requisites for coverage under each Act are distinct. *See Swanks*, 116 F.3d at 583-84. The ADA focuses on an individual's ability to perform the essential functions of a job, either with or without accommodation. In contrast, the SSA relies on a variety of factors (including age, education, ability to perform work widely available in the national economy), none of which take into account the accommodation issue. 20 C.F.R. § 404.1520(b-f); *Swanks*, at 583-85. It is this inherent distinction that fundamentally renders the application of a presumption of judicial estoppel inappropriate in an ADA case.

Rejection of Judicial Estoppel by the SSA and EEOC

The application of a rebuttable presumption of judicial estoppel has been expressly rejected by the Equal Employment Opportunity Commission and the Social Security Administration: the two government agencies responsible for administering the ADA and the SSDI program.[15] (U.S. Amicus Brf. at 13)[16]. Both the EEOC and

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[15] This guidance from the SSA and EEOC is significant because, as this Court recognized in *Bragdon v. Abbott*, 118 S.Ct. 2196 (1998), "the well-reasoned views of the agencies implementing a statute 'constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.' " *Id.* at 2206.

[16] "U.S. Amicus Brf." refers to the Brief for the United States as Amicus Curiae filed in support of the Petition for a Writ of Certiorari in this case.

the SSA have concluded that "although statements made in applying for social security disability benefits may be relevant evidence in a subsequent ADA suit, application for or receipt of benefits is not by itself inconsistent with being a 'qualified individual with a disability' under the ADA." *See* U.S. Amicus Brf. at 13, *citing, EEOC Guidance* at 70:1251-1252, 70:1254-1257, 70:1259-1266; Pet. App. 36a-50a; *SSA Guidance* App. 15-400-402; Pet. App. 18a-35a.

The SSA specifically stated in a June 2, 1993 memorandum that eligibility standards under the ADA and SSA have "no direct application to one another"; therefore, a finding of "total disability" under the SSA is not "synonymous" with a finding of an inability to work either with or without reasonable accommodations for purposes of the ADA. *See* Americans With Disabilities Act of 1990 – INFORMATION, Memorandum from the Associate Commissioner, SSA at 1, 3. Also, as confirmed by the EEOC and SSA, there are many individuals who would qualify as disabled because of having one of the SSA's "listed" impairments, and that "many persons with listed impairments, for example, amputations, in fact are able to work quite successfully, even though SSA would find them 'disabled' if they decided not to work and instead sought benefits." (Pet. App. 26a).

Moreover, an SSDI recipient may engage in a period of "trial work" and still remain eligible for benefits. *See* 42 U.S.C. § 422(a)-(c). This trial work program clearly reflects the SSA's intent to encourage disabled individuals to work. *See Id.; Mohamed v. Marriott, Int'l, Inc.*, 944 F.Supp. 277 (S.D.N.Y. 1996). A person's ability to receive Social Security disability benefits while working demonstrates that judicial estoppel would contravene the

intended purpose of "trial work" if ADA employers could patently refuse to participate in "trial work."

Rejection of Judicial Estoppel by A Majority of the Circuit Courts of Appeals; Adoption of a Case by Case Analysis with No Greater Weight Assigned to Statements of Disability to the SSA.

A majority of the Circuit Courts have rejected application of judicial estoppel in ADA cases, and have instead resolved that statements made in connection with a SSDI application are to be considered on a case by case basis in the context in which they were made, enjoying no greater exalted weight than any other evidence.

Specifically, the United States Court of Appeals for the District of Columbia issued two opinions holding that receipt of social security disability benefits is *not* a bar to a disability discrimination claim. *See Swanks v. Washington Metropolitan Area Transit Authority*, 116 F.3d 582 (D.C. Cir. 1997); *Whitbeck v. Vital Signs, Inc.*, 116 F.3d 588 (D.C. Cir. 1997). The court in *Swanks* and *Whitbeck* rejected the argument that a social security disability claim precludes a disability discrimination claim because the two schemes employ "quite different standards and objectives". *Swanks*, 116 F.3d at 583-4; *Whitbeck* 116 F.3d at 591. The D.C. Circuit in *Swanks* and *Whitbeck* recognized that in determining eligibility for social security disability benefits, the critical issue in an ADA case – *reasonable workplace accommodation* – is *not* considered. *Swanks*, 116 F.3d at 583-87; *Whitbeck*, 116 F.3d at 591. The D.C. Court noted that nowhere in the SSA's five step eligibility determination process is the question of reasonable workplace accommodation considered. *See Swanks*, 116 F.3d at

584-85. The *Swanks* Court further held that an SSA "determination that the claimant cannot do past work says nothing about the claimant's ability to perform his or her former job." *See Id.* at 585.

In *Swanks*, the court also noted that in reaching its conclusion, it did not mean that statements in support of a social security disability claim were never relevant in an ADA case. *Swanks*, at 587. For example, keeping with the position that SSA determinations do not consider whether a claimant could work with reasonable accommodations, the *Swanks* court noted that statements to the SSA of an inability to perform the essential functions of the job even with accommodation could bar the claimant from asserting in an ADA claim that an accommodation would have enabled the claimant to perform that same job.[17] *Swanks*, at 587.

Following *Swanks*, the Sixth Circuit in *Blanton v. Inco Alloys International, Inc.*, 123 F.3d 916, 917 (6th Cir. 1997)

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[17] In providing this example, the *Swanks* court cited *Pyramid Sec. Ltd. v. IB Resolution, Inc.*, 924 F.2d 1114, 1123 (D.C. Cir. 1991) (holding that parties' prior sworn statements must be given "controlling weight" at summary judgment unless "the shifting party can offer persuasive reasons for believing the supposed correction."). In *Swanks*, there was no evidence before the court of Swank's statements made to the SSA; therefore, the court did not analyze the facts or otherwise assign weight to the statements. *Swanks* at 587. This reference to a "controlling weight" assessment is inappropriate, however, because it assumes that there is some "correction" being made, when in fact, in the majority of cases, there is no "correction" because there is no inconsistency. Indeed, the *Swanks* example of the applicant who claims to be unable to work even with reasonable accommodations is a rare case, but nonetheless should be evaluated on its particular facts.

rejected application of judicial estoppel. The *Blanton* Court found that the receipt of social security disability benefits does not preclude an ADA claim and that prior sworn statements are only considered as a material factor in analyzing the case.[18] *Id.* In *Griffith v. Wal-Mart Stores, Inc.*, 135 F.3d 376 (6th Cir. 1998), the Sixth Circuit confirmed that "statements made in an application for Social Security disability benefits, while relevant, do not result in judicial estoppel." *Id.* at 382.

Likewise, the Seventh Circuit determined that an individual's claim for social security disability benefits does not bar a claim under the ADA. *See Weigel v. Target Stores*, 122 F.3d 461 (7th Cir. 1997).[19] The *Weigel* court held that the granting of social security disability benefits "is not determinative as to whether or not she [the employee] may be considered a 'qualified individual' under the ADA." *Weigel*, 122 F.3d at 466. The Seventh Circuit held that statements of "disability" to the SSA are "not irrelevant to the question of whether an ADA plaintiff is a 'qualified individual with a disability' ". *Id.* at 466-68. The Court further held that, in the absence of

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[18] In *Blanton*, the court emphasized that it rejected judicial estoppel, and instead, simply found that "in light of the overwhelming weight of the medical evidence, as well as Blanton's own admissions" that Blanton was unable to perform his former position. *Blanton*, 123 F.3d at 917.

[19] *See also, Overton v. Reilly*, 977 F.2d 1190, 1196 (7th Cir. 1992) wherein the Seventh Circuit held that the issue of whether the plaintiff was entitled to social security disability benefits might be relevant to the severity of the handicap, but that such a determination could not be construed as a judgment that such a plaintiff was not qualified to do his job under the Rehabilitation Act.

evidence that the individual could have performed her prior job with reasonable accommodation, such statements along with other evidence could support summary judgment. *Id.*

However, the *Weigel* court, also observed that declarations of being " 'wholly unable to work,' or some other variant to the same effect" are not conclusive on the issue of whether that same individual is a "qualified individual with a disability" under the ADA. *Id.* at 466-67. Therefore, the court found that the apparent incongruity between an ADA claim and an SSA claim is "entirely illusory because the terms, 'totally disabled' and 'qualified individual with a disability' are terms of art that must be understood within their respective statutory contexts." *Id.* at 466.

Following *Weigel*, the Seventh Circuit left no doubt that it does "not apply judicial estoppel to foreclose ADA claims when the claimant has applied for disability benefits." *See Haschmann v. Time Warner Entertainment Co.*, 151 F.3d 591, 603 (7th Cir. 1998). In *Haschmann*, the court maintained this anti-estoppel position in recognition of the distinctions between the ADA and the SSA, including the ADA's consideration of the impact of reasonable accommodations. *Id.* As in *Weigel*, the court again held that, while not dispositive, the receipt of disability benefits may be relevant to the issue of whether an individual is a qualified individual with a disability. *Haschmann*, 151 F.3d at 603. In upholding the finding that Haschmann was a "qualified individual with a disability", the court analyzed Haschmann's statements in the context and time frame in which they were made. *Id.* at 603-04. This analysis revealed that although Haschmann was awarded benefits, her statements to the SSA were not inconsistent with her position in her ADA case. *Id.*

In *Talavera v. School Board of Palm Beach County*, 129 F.3d 1214 (11th Cir. 1997), the Eleventh Circuit Court of Appeals also rejected application of judicial estoppel in ADA cases. The court specifically held that "a certification of total disability on an SSD [social security disability] application is not inherently inconsistent with being a 'qualified individual with a disability' under the ADA." *Talavera*, 129 F.3d 1220. When analyzing the interplay between a claim for social security disability benefits and a claim of being a "qualified individual with a disability", the Eleventh Circuit recognized that the Fifth Circuit's opinion in *Cleveland* exuded an "obvious skepticism" and displayed a reluctance to find that individuals who are "totally disabled" for social security disability purposes are covered by the ADA.[20] *Id.* at 1219.

Rejecting the "skeptical" position of the Fifth Circuit, the Eleventh Circuit held that: "A certification of total disability on a SSDI application does mean that the applicant cannot perform the essential functions of her job without reasonable accommodation. It does not necessarily mean that the applicant cannot perform the essential functions of her job with reasonable accommodation." *Talavera*, 129 F.3d at 1220. After examining the particular facts of the case, including the claims of total disability to the SSA, the *Talavera* court determined that based on the evidence, there was a dispute of fact as to whether Ms. Talavera's disability rendered her unable to perform the

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[20] Indeed, as noted by the Solicitor General's amicus brief in support of a writ in this case, countless ADA cases in the Fifth Circuit have been barred based on the "essentially all cases are barred" directive from *Cleveland*. (*See* U.S. Amicus Brf. at 11).

essential functions of her job *with accommodation*. *Id.* at 1221.

Likewise, the Ninth Circuit rejected judicial estoppel in ADA cases in *Johnson v. Oregon Dept. of Human Resources Rehabilitation*, 141 F.3d 1362 (9th Cir. 1998). The court observed:

> [W]hat may be considered a disability or total disability under legal precepts of certain federal or state disability statutes or private instruments conferring disability benefits may differ under provisions of other federal or state legislation or other private instruments. Therefore, a statement averring a legal conclusion in a previous application or proceeding as to disability may not always preclude eligibility in subsequent applications or proceedings. Having said this, however, we emphasize that material factual statements made by an individual in prior disability applications or proceedings may be binding in subsequent claims.

Johnson, 141 F.3d at 1368. However, the court further expounded and said:

> [T]he law does not require plaintiffs to choose between applying for benefits and pursuing an ADA claim. *They may do both.*

(Emphasis added) *Id.* at 1370.

The *Johnson* court further observed that such representations may constitute useful evidence, and that a " 'straightforward summary judgment analysis, rather than theories of estoppel' will be appropriate in most cases." *Id.* at 1369; *citing, Griffith v. Wal-Mart Stores, Inc.*, 135 F.3d 376, 382-83 (6th Cir. 1998). After reviewing the statements of disability made by Johnson to the SSA, the

court held that there was no inconsistency with her ADA claim. *Johnson*, 141 F.3d at 1369-70. Specifically, the court noted that the description of her disability in her applications matched that in her ADA case and that she did not tell the SSA that she could not work even with accommodation. *Id.* The court therefore found that her representations of disability were not irreconcilable, and that there was no evidence that Johnson "acted in bad faith or was playing fast and loose with the courts." *Id.* at 1370.

As with the majority of Circuits, the Tenth Circuit likewise rejected application of judicial estoppel to ADA cases where the plaintiff has applied for or received social security disability benefits. *See Rascon v. U.S. West Communications, Inc.*, 143 F.3d 1324 (10th Cir. 1998). The *Rascon* court held that statements made in connection with an application for social security disability benefits cannot be an automatic bar to an ADA claim, but may constitute evidence relevant to a determination of whether the plaintiff is a "qualified individual with a disability." *Id.* at 1332. The *Rascon* court also noted that despite Rascon's representations in his application for disability benefits that he did not *ever* plan to return to work, there was no evidence that he could not have performed the essential functions of the job with reasonable accommodation. (Emphasis added) *Id.*

In sum, the EEOC, the SSA and a majority of the Circuit Courts of Appeals, reject a strict application or presumption of judicial estoppel and have resolved that statements made in an SSDI application may be relevant (as with any other type of evidence in an ADA case), but are not dispositive on the "qualified individual with a

disability" issue.[21] As was done in *Talavera, Johnson, Rascon, Haschmann* and *Weigel,* the weight to be given statements made in connection with an application for SSDI benefits should be determined on a case by case

[21] *Cf., McNemar v. The Disney Store, Inc.*, 91 F.3d 610, 617-18 (3d Cir. 1996), *cert. denied*, 117 S.Ct. 958 (1997) (plaintiff was judicially estopped from claiming to be "qualified" under the ADA; plaintiff's statements made on his disability benefits application that he was "totally disabled" and "unable to work" were "unconditional assertions as to his disability" and he should not be permitted to "qualify" such statements); *Moore v. Payless Shoe Source, Inc.*, 139 F.3d 1210, 1213 (8th Cir. 1998) ("prior representations of total disability carry sufficient weight to grant summary judgment against the [ADA] plaintiff" absent "strong countervailing evidence that the employee is in fact qualified"; affirming summary judgment on ground that affidavit of plaintiff stating she could have performed her job with reasonable accommodations was not sufficient evidence to countervail her on-going representations to the SSA that she was "unable to work"; but also, stating that a less strict standard may have applied had plaintiff specified to the SSA that she requested reasonable accommodations). These cases, like *Cleveland*, essentially divide the disabled into two groups, i.e., those who can work and those who cannot. In addition to deviating from the position of the EEOC, the SSA and a majority of the Circuit Courts, this approach is erroneous because it is not possible to make meaningful determinations about whether a disability can be reasonably accommodated under the ADA outside the context of a specific job – a context which the SSA does not consider. *See also*, Matthew Diller, *Dissonant Disability Policies: The Tensions Between the Americans With Disabilities Act and Federal Disability Benefit Programs*, Tex. L. Rev. 1003, 1007 (1998).

Notably, the Third Circuit in *Krouse v. American Sterilizer Co.*, 126 F.3d 494 (3rd Cir. 1997) observed that *McNemar* had come under considerable criticism, some of which might be well-founded. *Id.* at 502-03.

basis after an evaluation by the factfinder of the context in which the statements were made.[22]

A presumption of judicial estoppel in ADA cases is wrong because of the obvious differences in each Act, many individuals could meet the criteria for benefits under both Acts, and could do so legitimately without compromising their integrity or the integrity of the courts or the administrative system. Accordingly, there should be no presumption of, or any, judicial estoppel in an ADA case, nor should declarations of disability to the SSA be given greater weight than any other evidence.[23]

[22] The statements made in connection with an SSA application will no doubt vary from case to case; therefore, a case by case analysis of the weight to be given such statements is proper. *See McKennon v. Nashville Banner Publishing Co.*, 115 S.Ct. at 886 (in cases involving after-acquired evidence issues, "the factual permutations and equitable considerations" will vary from cases to case, and therefore, the proper remedial relief should be addressed by the judicial system in the ordinary course of further decisions).

[23] Although an ADA claimant who has previously sworn to the SSA that she is "unable to work either with or without reasonable accommodations" may have an "inconsistency" issue sufficient to constitute a bar, in light of the distinctions in the Acts, even such specifically inconsistent statements should be evaluated on a case by case basis in the context in which they were made. In other words, statements to the SSA, whether they address the issue of reasonable accommodation or not, should be treated the same as any other evidence presented in an ADA case. If in fact, upon evaluation there is an inconsistency, the impact of such, as with any other credibility assessment, should be determined by the factfinder.

Cleveland was not "inconsistent"

Employers such as PMSC should not be exempt from ADA compliance because a disabled individual, who at some point in time applied for or received social security disability benefits, is required to overcome a heightened legal burden which is not only unwarranted, but also, under the *Cleveland* Opinion, virtually impossible to rebut. The misguided impact of a presumption of judicial estoppel is particularly evident on closer review of Carolyn Cleveland's statements to the SSA. Upon consideration of the context in which the statements were made, there is nothing inconsistent between these statements and her position in her ADA case.

Cleveland is a perfect representative of the type of individual who should have been able to invoke the protection of the ADA to redress the disability-based discrimination she suffered. Yet under the Fifth Circuit's "rebuttable presumption" application of judicial estoppel, the merits of her ADA claim were not even considered. Instead, after summarizing selected statements from Cleveland's applications for social security disability benefits, and without considering the fact that the SSA does not inquire about (or even consider) the issue of reasonable accommodations, the Fifth Circuit determined that Cleveland's statements to the SSA precluded her from rebutting "the presumption that while she remains disabled for purposes of Social Security, she is estopped from asserting that she is a 'qualified individual with a disability.' " *Cleveland*, 120 F.3d at 518; Pet. App.12a. Had Cleveland's statements been evaluated in their entirety in the context in which they were made, and in the absence of a presumption that she was judically estopped to claim she was "otherwise qualified" under the ADA, an alleged

inconsistency would never have materialized in the first place.

Specifically, in *Cleveland*, the Fifth Circuit's opinion focused on the following excerpts from the SSA file: (1) an initial application filed with the assistance of her daughter, where Cleveland certified that she was "unable to work because of her disabling condition on January 7, 1994" and was "still disabled"; (2) a September 1994 (post termination) "Request for Reconsideration" which stated "I continue to be disabled"; (3) a "Work Activity Report" wherein Cleveland stated she was terminated "because I could no longer do the job because of my condition"; (4) a January 1995 "Request for Reconsideration" and a May 1995 request for hearing before an ALJ wherein she stated she was "unable to work due to my disability". (Pet. App. 3a; *Cleveland*, at 514-15, 518).

In arriving at the conclusion that Cleveland's statements were "inconsistent", the Fifth Circuit failed to acknowledge the context in which these selected statements were made. First, as previously pointed out in this Brief, the statements themselves are not inconsistent with her claim to be a "qualified individual with a disability" because they were made in a forum which does not consider the effect that reasonable workplace accommodations would have on the ability to work. Additionally, if the statements are examined in the time period in which they were made, they are each accurate statements. For instance, in January 1994 when the application was originally submitted, Cleveland had just suffered her stroke and was unable to work. (J. App. 94-95, 100, 104-05). Additionally, in asserting that Cleveland "continuously and unequivocally represented to the SSA that she

is totally disabled and completely unable to work"[24], the Fifth Circuit ignored the fact that Cleveland notified the SSA in April 1994 that she had returned to work and no longer needed benefits. (J. App. 38, 95). In fact, it was the notice to the SSA that Cleveland had returned to work that prompted the initial denial of SSDI benefits. (J. App. 38-39). Although not noted by the Fifth Circuit, Cleveland explained in her September 1994 Request for Reconsideration:

> I disagree with the determination made on my claim for disability-worker or child benefits because I was denied because I had returned to work and was making over $500. However, on July 15, 1994 I was terminated due to my condition and I have not been able to work since. I continue to be disabled.

(J. App. 46). Notably, from this explanation, the Fifth Circuit in claiming that Cleveland was being less than honest, excised and showcased only the "I continue to be disabled" statement. Likewise, the Fifth Circuit ignored the summary judgment evidence demonstrating that but for PMSC's refusal to accommodate Cleveland's disability and ultimate termination, Cleveland would not have requested reconsideration of the initial denial of benefits. (J. App. 95-98, 100-01). The court also failed to consider the evidence submitted by Cleveland and her doctors which demonstrated that, as a direct result of her termination, Cleveland's medical condition worsened to the point that she was unable to work. (J. App. 64-65, 69-72, 98, 100-101).

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[24] *Cleveland*, at 518; Pet. App. 12a.

In examining the "Work Activity Report", the Fifth Circuit again considered only part of the statement, as opposed to her entire explanation:

> I had my stroke 1/7/94 and was out of work for several months. I attempted to return to work mid April. I worked for three months before they terminated me because I could no longer do the job because of my condition.

(J. App. 47). Although the Fifth Circuit insinuated that Cleveland was being less than forthright when she stated that she was terminated because she could not do the job (the only sentence of this excerpt that the Court focused on), Cleveland only repeated what PMSC had told her, i.e., that she could no longer do the job because of her condition. (J. App. 97-98). Recall, in terminating Cleveland for poor job performance, Peter Moore informed Cleveland that his father had never been able to do anything after having a stroke and neither would Cleveland. (J. App. 97-98). In concluding that Cleveland was advancing inconsistent positions, the Fifth Circuit completely discounted this fact, and likewise ignored Cleveland's evidence that had she been accommodated, she could have continued employment. (J. App. 95-98).

The Fifth Circuit also disregarded the fact that reasonable job accommodation is *not* an issue for the SSA and bears no relevance to the SSA's inquiry into Cleveland's "disabled" status. *See Swanks* at 583-87. As such, reasonable workplace accommodation is not relevant nor considered by the SSA.[25] Nevertheless, additional statements made by Cleveland to the SSA confirm that she

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[25] Similarly, Cleveland's belief that PMSC discriminated against her because of her disability is not an issue for the SSA

needed accommodations such as additional time to perform tasks. Specifically, in a September 1994 "Supplemental Questionnaire" Cleveland explained her difficulty completing tasks as follows: "Yes, in a timely manner due to length of time it takes to complete the task." (J. App. 56). Although ignored by the Fifth Circuit, this statement is consistent with Cleveland's prior request to take work home with her to allow additional time to complete the assignment – an accommodation which was denied by PMSC. (J. App. 96).

Likewise, Cleveland's statements that "I am unable to work due to my disability" made in her January and May 1995 reconsideration requests were true at the time, and were not inconsistent with her position in her ADA claim. In these non-specific statements, Cleveland did not reference (nor was she asked or required to reference) whether she could have worked had PMSC accommodated her, rather than terminating her and causing her condition to deteriorate. Whether pre- or post-termination, there is nothing inconsistent in Cleveland's various statements which would warrant a presumption of judicial estoppel, much less, a holding that Cleveland failed

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(and was not raised in her SSA application). As with a claim of disability discrimination, a claim of an ability to work with reasonable accommodations, is properly voiced in an ADA lawsuit – a forum which, unlike the SSA, considers such issues relevant. That Cleveland, or any other SSA applicant, informs the SSA that they are unable to work, without specifying whether they could work with reasonable accommodations, simply does not create an inconsistency with an ADA claim and does not warrant application of a presumption of judicial estoppel.

to rebut the presumption. Cleveland's summary judgment evidence plainly established genuine issues of material fact which precluded summary judgment.

Clearly, Cleveland's statements regarding her disability are not inconsistent and do not invoke the application of a presumption of judicial estoppel.[26] In applying a presumption of judicial estoppel, the Fifth Circuit not only erroneously saddled Cleveland with a heightened legal burden, but created a burden which is simply antithetical in the context of an ADA case. After all, Congress surely did not intend for the ADA's protection to be unavailable to 7.3 million SSDI recipients in this Country who might otherwise return to gainful employment.

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[26] Even if this Court were to determine that judicial estoppel applies in ADA cases (which Petitioner asserts that it should not) and that Cleveland's statements were inconsistent (which they are not), PMSC, as a result of its own unlawful conduct, is not entitled to benefit from this doctrine because "it [estoppel] is for the protection of the innocent, and only the innocent may invoke it." *See Douglas v. Aztec Petroleum Corp.*, 695 S.W.2d 312, 317 (Tex. App. – Tyler 1985, no writ); *See also, Regional Properties, Inc. v. Financial & Real Estate Consulting Co.*, 752 F.2d 178, 183 (5th Cir. 1985). The *Douglas* court further held that "[a] person my not predicate an estoppel theory in his favor on, or assert such estoppel for the purpose of making effective, obtaining the benefit of, or shielding himself from the results of his own fraud . . . dereliction of duty, *violation of the law*, wrongful act or other inequitable conduct in the transaction in question." *Id.* At 317-18.

CONCLUSION

For the above reasons, Petitioner, Carolyn C. Cleveland, respectfully requests that this Court reverse the judgment of the Fifth Circuit and remand this case to the District Court for trial on the merits.

Respectfully submitted,

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